UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALIS S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD, RACHEL MEEROPOL,

Plaintiffs,

v.

GEORGE W. BUSH, President of the United States, NATIONAL SECURITY AGENCY, LTG Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, LTG Michael D. Maples, Director; CENTRAL INTELLIGENCE AGENCY, Porter J. Goss, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JOHN D. NEGROPONTE, Director of National Intelligence,

Defendants.

Case No. 06-cv-313(GEL)(KNF)

MEMORANDUM OF LAW OF AMICUS CURIAE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Association of the Bar of the City of New York (the "Association") respectfully submits this brief as amicus curiae in support of plaintiffs' motion for partial summary judgment. The parties have consented to this filing.

I. STATEMENT OF INTEREST OF AMICUS CURIAE.

Founded in 1870, the Association is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Civil Rights Committee, the Association educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts, the right to counsel and the right to remain free from unreasonable searches and seizures. The Association also seeks to promote effective assistance of counsel for everyone, including unpopular persons and groups, and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the Association has attempted to demonstrate by various means—including through the filings of amicus curiae briefs—that individual liberties need not be subverted by governmental power during times of war and that national security can be achieved without prejudice to constitutional rights that are at the heart of our democracy. Of particular relevance here, the Association co-sponsored the resolution adopted by the House of Delegates of the American Bar Association in February of 2006, urging the President to halt the surveillance program being conducted by the National Security Agency ("NSA") and instead, if necessary, work with Congress to amend the Foreign Intelligence Surveillance Act of 1978 ("FISA").

II. SUMMARY OF ARGUMENT.

The Association joins plaintiffs' arguments concerning the illegality of the NSA Surveillance Program, as compellingly set forth in plaintiffs' memorandum in support of their motion for partial summary judgment ("Pls.' Mem."). As plaintiffs argue, the NSA Surveillance Program should be enjoined because: (i) it fails to comply with FISA—the "exclusive means by which electronic surveillance . . . may be conducted" within the United States, 18 U.S.C. § 2511(2)(f) (see Pls.' Mem. at 14-21); (ii) Congress' enactment of the Authorization for Use of Military Force Against al Qaeda, S.J. Res. 23, 107th Cong., 115 Stat. 224 (Sept. 18, 2001) (the "AUMF") did not overrule or modify FISA and thus does not legalize the NSA Surveillance Program (Pls.' Mem. at 15-21); (iii) in FISA, Congress lawfully circumscribed the President's Article II powers since "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens", Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) (see Pls.' Mem. at 21-32); and (iv) the NSA Surveillance Program does not comply with the Fourth and First Amendments (see id. at 32-42).

The Association submits this brief to highlight the chilling impact the NSA Surveillance Program has had and will continue to have on the relationship between lawyers and clients who are accused of having ties to terrorist organizations. As set forth below, the NSA's admitted practice of wiretapping privileged communications in the name of national security—without a court warrant and pursuant to undisclosed standards that are never subjected to judicial scrutiny—chills a broad spectrum of constitutionally protected speech, including communications between attorneys and their clients. Since FISA provides a reasonable and comprehensive framework for the Executive Branch to protect the Nation's security—a framework that Congress has oftentimes amended and can further revise as necessary—the

Association is concerned that fundamental rights, including the right to counsel are being impermissibly and unnecessarily undermined.

III. THE RELEVANT BACKGROUND.

In the wake of a newspaper article revealing that the NSA had been engaged in warrantless wiretapping of American citizens since 2001, see J. Risen & E. Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1, the President informed the Nation that he had authorized and would continue to authorize such surveillance so long as the perceived threat posed by al Qaeda and other terrorist organizations continued.

Although few details concerning the program have been revealed, during a press briefing, the Attorney General explained that the NSA wiretaps conversations once it has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda". Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005 ("Gonzales Press Briefing"), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. The Attorney General testified before Congress that, "like the police officer on the beat", NSA personnel unilaterally decide "what is reasonable" before proceeding with the wiretaps. Hearings Before the Sen. Comm. on the Judiciary (Feb. 7, 2006), transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html. After plaintiffs' motion for partial summary judgment was filed, the Department of Justice explained that "decisions about what communications [the NSA] intercept[s] are made by professional intelligence officers at the NSA who are experts on al Qaeda and its tactics". See Department of Justice's Responses to Joint Questions from House Judiciary Committee Minority Members ¶ 2, available at http://rawprint.com/pdfs/HJCrawstory2.pdf ("DOJ Responses").

It is uncontested that, to the extent that the procedures followed by NSA personnel to conduct the wiretaps are scrutinized at all, such oversight is only undertaken by other members of the Executive Branch. Thus, the Department of Justice says that individuals from the NSA's General Counsel and Inspector General offices review the program, with the participation of the Office of the Director of National Intelligence and Department of Justice. DOJ Responses ¶ 18. However, the standards purportedly being applied by the NSA personnel before wiretaps are conducted are undisclosed to and never reviewed, let alone questioned, by a neutral and disinterested magistrate.

Recent revelations by the Department of Justice also leave no doubt that the NSA's warrantless wiretaps reach communications between lawyers and their clients. Indeed, the Justice Department has affirmatively stated that "[a]lthough the Program does not specifically target the communications of attorneys . . . calls involving such persons would not be categorically excluded from interception if they met [the Program's] criteria". DOJ Responses ¶ 45; see also Privileged Conversations Said Not Excluded From Spying, N.Y. Times, March 25, 2006, at A10.

IV. THE NSA SURVEILLANCE PROGRAM IMPERMISSIBLY IMPEDES ATTORNEY-CLIENT COMMUNICATIONS IN VIOLATION OF THE FIRST AND SIXTH AMENDMENTS.

A. The Importance of Preserving the Confidentiality of Attorney-Client Communications.

The importance of protecting the confidentiality of communications between lawyers and their clients is deeply rooted in our legal system. For hundreds of years, the courts of this country have held that disclosures made by clients to their attorneys to facilitate the rendering of legal advice are protected with a "seal of secrecy". See. e.g., Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). Thus, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law". Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citations omitted).

The purpose of such confidentiality "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice". Upjohn, 449 U.S. at 389; see also Fisher v. United States, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could . . . be obtained from the attorney following disclosure . . . the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As the Supreme Court has noted, the attorney-client privilege shields communications between lawyers and clients relating to legal advice in recognition "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client". Upjohn, 449 U.S. at 389.

In recognition of the importance of confidential communications between lawyers and their clients, FISA itself includes two kinds of special protections for such communications. First, prior to obtaining a warrant,[1] a federal officer acting with the consent of the Attorney

[1] As "a recognition by both the Executive Branch and the [Legislative Branch] that the statutory rule of law must prevail in the area of foreign intelligence surveillance", S. Rep. No. 95-604, at 7 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904, 3908 (hereinafter, "Legislative History"), FISA requires a judicial warrant for all electronic surveillance for foreign intelligence in the United States that may intercept communications of United States persons. 50 U.S.C. § 1805.

General must submit an application that includes "a statement of the proposed minimization procedures" to be followed during and after the wiretap. 50 U.S.C. § 1804(a)(5).[2] Before issuing the warrant, a FISA court judge must find that "the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title", 50 U.S.C. § 1805(a)(4). Section 1801(h)(1) of FISA defines "minimization procedures" as "specific procedures . . . adopted by the Attorney General . . . reasonably designed . . . to minimize the acquisition and retention . . . of nonpublicly available information concerning unconsenting United States persons".

The NSA's current Legal Compliance and Minimization Procedures manual, which was last modified in 1993, specifically deals with the wiretapping of attorney-client communications and provides that:

> As soon as it becomes apparent that a communication is between a person who is known to be under criminal indictment and an attorney who represents that individual in the matter under indictment (or someone acting on behalf of the attorney), monitoring of that communication will cease and the communication shall be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the tape containing that conversation will be placed under seal and the Department of Justice, Office of Intelligence Policy and Review, shall be notified so that appropriate procedures may be established to protect such communications from review or use in any criminal prosecution, while preserving foreign intelligence contained therein.

Legal Compliance and Minimization Procedures, USSID 18 annex A, app. 1 § 4(b) (Jul. 27, 1993), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm (emphases added). Thus, warrants permitting wiretaps of communications between attorneys and criminal

[2] By the time FISA was adopted, the Supreme Court had already noted that some efforts by the government to limit the scope of the intrusion incident to the wiretap were required by the Fourth Amendment. See Berger v. State of New York, 388 U.S. 41, 55-57 (1967). Following FISA's enactment, the Supreme Court again held that such minimization efforts were required by the Constitution. Scott v. United States, 436 U.S. 128 (1978).

defendants are impermissible because they are inconsistent with FISA's minimization procedures.

Second, FISA provides that "[n]o otherwise privileged communication[s] obtained in accordance with, or in violation of, the provisions of this subchapter shall lose [their] privileged character". 50 U.S.C. § 1806(a). Thus, any wiretapped communications between attorneys and clients (whether or not indicted) retain their privileged status and neither the privileged communications nor their fruit may be used in court.[3] This strict prohibition by itself deters the wiretapping of communications between attorneys and clients, since future prosecutions based on evidence obtained from illegal wiretaps could be compromised.

FISA's provisions dealing with minimization procedures and the preservation of privilege have been part of the statute since 1978. Those provisions remained unaltered after the tragedies of September 11, 2001, despite the fact that Congress enacted substantial amendments to FISA designed to enable the government to fight terrorism more effectively.[4]

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[3] In fact, "[a]ny person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used . . . may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—(1) the information was unlawfully acquired; or (2) the surveillance was not made in conformity with an order of authorization or approval". 50 U.S.C. § 1806(e).

[4] In the months that followed AUMF, Congress amended FISA in an act titled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (i.e., the USA PATRIOT Act of 2001). See Pub.L. No. 107-56, 115 Stat. 272. Among other things, the USA PATRIOT Act of 2001 increased the number of judges serving on the FISA court from seven to eleven. Pub. L. No. 107-56, § 208, 115 Stat. 272, 283. Within a few months of the USA PATRIOT Act of 2001, Congress amended FISA further, enlarging the window available to the Government retroactively to seek a warrant from 24 to 72 hours. Pub. L. No. 107-108, § 314(a)(2)(B), 115 Stat. 1394, 1402. Finally, FISA was last amended in 2004, as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, an act considered by the President to be "the most dramatic reform of our Nation's intelligence capabilities since President Harry S. Truman signed the National Security Act of 1947". See Press Release, White House, President Signs Intelligence Reform and Terrorism Prevention Act (Dec. 17, 2004), available at http://www.whitehouse.gov/news/releases/2004/12/print/20041217-1.html. This last series of

The right to confidential communication between attorney and client is also protected under the International Covenant on Civil and Political Rights (the "Covenant"), a major treaty ratified by the United States designed to guarantee "those civil and political rights with which the United States and the western liberal democratic tradition have always been associated". Letter from Warren Christopher, Department of State, to The President (Dec. 17, 1977), available at 1966 U.S.T. LEXIS 521, at *22. Article 14(3) of the Covenant protects a criminal defendant's right to counsel and, as explained by the comments to that provision, "requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications". Human Rights Committee, General Comment 13, Article 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 21st Sess., at 14, U.N. Doc. HRI/GEN/Rev.1 ¶ 9 (1994), available at http://www1.umn.edu/humanrts/gencomm/hrcom13.htm.

The importance of preserving the confidential nature of communications between lawyers and their clients has also been recognized by foreign legislatures. For instance, Britain's Covert Surveillance Code of Practice, pursuant to Section 71 of the Regulation of Investigatory Powers Act of 2000, provides in relevant part that "privilege is not lost if a professional legal adviser is properly advising a person who is suspected of having committed a criminal offence". Id. § 3.4. In addition, wiretaps that "may lead to such information [i.e., privileged information] being acquired [are] subject to additional safeguards under [the] code", id. § 3.5, for instance that the "application for surveillance which is likely to result in the acquisition of legally privileged information . . . only be made in exceptional and compelling circumstances", id. § 3.6.

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amendments added a new section to FISA, which imposes certain semi-annual reporting requirements on the Attorney General with respect to, among others, "electronic surveillance under section 1805". 50 U.S.C. § 1871.

Similarly, German criminal procedural law generally prohibits the surveillance and recording of confidential communications between lawyers and their clients. As soon as it becomes apparent that the surveillance is targeting such communications, the surveillance and recording have to be terminated, all recordings of such communications have to be destroyed without undue delay and the information obtained from such surveillance may not be used for prosecutorial purposes or admitted as evidence. See German Criminal Procedural Code (Strafprozessordnung) § 100c(V)-(VI).

Foreign courts examining the importance of preserving the confidential nature of communications between lawyers and their clients have also concluded that such confidentiality should be preserved. In S. v. Switzerland, (1991) 14 EHRR 670, the European Court of Human Rights held that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society . . .". Id. at ¶ 48. Similarly, in Niemetz v. Germany, (1992) 16 EHRR 97, the European Court of Human Rights held that the search of a lawyer's office, including his client files, violated the lawyer's right to privacy, emphasizing that "where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by" the European Convention for the Protection of Human Rights and Fundamental Freedoms. Id. at ¶ 37. Similarly, the German Federal Constitutional Court has emphasized recently that confidential communications between a criminal defendant and his counsel enjoy absolute protection under the German Constitution. Bundesverfassungsgericht [BVerfG] March 3, 2004, 1 BvR 2378/98 and 1 BvR 1084/99.

B. Wiretapping Communications Between Lawyers and Their Clients Chills Communications Protected by the First Amendment.

The NSA's practice of wiretapping communications between lawyers and their clients without a warrant has impermissibly chilled[5] and will further chill constitutionally protected speech, in violation of the First Amendment. Before FISA was enacted, in United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) (the "Keith" case), the Supreme Court noted—in the context of addressing warrantless wiretapping for domestic intelligence purposes but in words equally applicable to the NSA surveillance program—the degree to which warrantless surveillance is inconsistent with the guarantees of the First Amendment:

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security". Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314.

Keith also underscored the inherent danger of permitting the acts of the Executive to go unchecked:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole

[5] The Affirmation of William Goodman submitted in support of plaintiffs' motion for partial summary judgment describes some of the chilling effects the NSA Surveillance Program has had on communications between lawyers and clients. Lawyers now have to wait for face-to-face meetings with their clients and are unable properly to investigate facts integral to their clients' defenses. (See Goodman Aff. ¶¶ 15-16, 19.) In sum, the NSA Surveillance Program leads lawyers and clients to speak to each other less often and sometimes not at all (see id.), thereby impeding the lawyers' ability effectively to represent their clients, and saddles clients (and lawyers who agree to represent clients on a pro bono basis) with extraordinary and unnecessary expenses.

judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . . [T]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

Id. at 317.[6]

The legislative history of FISA demonstrates that Congress shared the Keith court's view that warrantless searches by an unchecked Executive raised the specter of abuse—especially given the documented history of abuse in this area[7]—and chilled protected speech:

> Also formidable—although incalculable—is the "chilling effect" which warrantless electronic surveillance may have on the Constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on Constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

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[6] See also Scott, 436 U.S. at 137 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.") (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

[7] Following its investigation of past practices of the Executive Branch, Congress was informed that the "vague and elastic standards for wiretapping and bugging" the Executive Branch had been applying resulted in "electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated". Legislative History at 8. For instance, Congress was informed that past subjects of surveillance "ha[d] included a United States Congressman, congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam war protest group". Id. Furthermore, claims of national security had sometimes been used to justify warrantless wiretapping of members of the Democratic Party, ostensibly because the Executive Branch had boundlessly defined the term "dissident group". United States v. Falvey, 540 F. Supp. 1306, 1309 (E.D.N.Y. 1982).

Legislative History at 8 (emphasis added).

As one pre-FISA Court of Appeals described the chilling effect of warrantless foreign intelligence gathering: "To allow the Executive Branch to make its own determinations as to such matters invites abuse, and public knowledge that such abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy". Zweibon v. Mitchell, 516 F.2d 594, 635-36 (D.C. Cir. 1975).

The chilling effects of the NSA Surveillance Program are most troubling in the context of the relationship between an attorney and his client. The right of meaningful access to the courts is one aspect of the First Amendment right to petition the government, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972),[8] and the right to assistance of counsel—which includes the right to confidential attorney-client communication—is an integral part of that right. See, e.g., Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972) (prison inmates, who have fewer First Amendment rights than non-incarcerated persons, possess the rights to access the courts, to have assistance of counsel, and to have "the opportunity for confidential communication between attorney and client"). This First Amendment right is undermined by the NSA Surveillance Program, a program that might very well destroy the confidentiality of communications which are intercepted and thus chill all communications between attorneys and clients.

The Supreme Court has also held that, for politically unpopular groups who are forced to resort to the courts to redress disparate treatment at the hands of the government, the right to pursue litigation is protected by the First Amendment. NAACP v. Button, 371 U.S. 415,

[8] "The right of access to the courts is indeed but one aspect of the right of petition." California Motor, 404 U.S. at 510.

428-30 (1963). The attorneys who represent these politically unpopular groups and thereby challenge what they believe to be unlawful government policies similarly engage in a form of protected political expression. Id.; see also In re Primus, 436 U.S. 412, 431-32 (1978) ("The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advising another that his legal rights have been infringed....") (internal citations omitted); Westchester Legal Servs., Inc. v. County of Westchester, 607 F. Supp. 1379, 1382 (S.D.N.Y. 1985) ("The First Amendment 'protects the right of associations to engage in advocacy on behalf of their members.'") (quoting Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979)).

Many of those whom the NSA Surveillance Program has likely targeted have been accused by the United States of wrongdoing, and are vigorously litigating their innocence against the government. But "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants". Primus, 436 U.S. at 431. The NSA Surveillance Program seriously inhibits the ability of these accused persons—supposedly members or affiliates of politically unpopular groups accused of terrorism—effectively to litigate their position because it necessarily chills communications with their attorneys, as well as communications between their attorneys and witnesses and others who reside outside the United States. Moreover, the inability of the attorneys effectively to litigate against what they believe to be unlawful government conduct effectively chills the political speech and expression of those attorneys as well. See Button, 371 U.S. at 428-30; Primus, 436 U.S. at 431-32.

C. Wiretapping Communications Between Lawyers and Their Clients Inhibits Effective Assistance of Counsel.

The Sixth Amendment guarantees the accused's right to effective assistance of counsel,[9] but this right is meaningless if attorneys and clients cannot speak freely and openly. "[T]he essence of the Sixth Amendment right is, indeed, [the] privacy of communication with counsel". United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973) (citations omitted). Courts have found that "a critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a 'relationship characterized by trust and confidence'". United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990) (quoting Morris v. Slappy, 461 U.S. 1, 21 (1983)) (emphasis added).

Numerous courts have thus recognized that the Sixth Amendment's protections overlap with the common law attorney-client privilege. See, e.g., United States v. Noriega, 917 F.2d 1543, 1551 n.9 (11th Cir. 1990) ("Because 'a communication between an attorney and his client that is protected by the common law attorney-client privilege is also protected from government intrusion by the sixth amendment', this discussion of attorney-client privilege encompasses the Sixth Amendment right to effective assistance of counsel.") (internal citations omitted). Indeed, the Supreme Court's explanation of the rationale for the attorney-client privilege highlights why the confidentiality of such communications is necessarily protected by the Sixth Amendment: "As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the

[9] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. At this point, the Complaint does not allege a violation of the Sixth Amendment. The Association nevertheless submits that the insurmountable tension between the NSA Surveillance Program and the basic tenets of the Sixth Amendment is highly relevant to the issues before the Court.

absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." Fisher, 425 U.S. at 403.[10]

Given that the need to obtain "fully informed legal advice" is clearly a component of "effective assistance of counsel," see Upjohn, 449 U.S. at 389 ("sound legal advice . . . depends upon the lawyer's being fully informed by the client"), it necessarily follows that the Sixth Amendment protects against unreasonable governmental intrusion into the confidentiality of attorney-client communications. See, e.g., Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983) (holding that a Sixth Amendment violation occurred where the government obtained and used a document containing confidential communications between the defendant and his attorney and noting that the issue involved "a constitutional right which is at the heart of our adversary system of criminal justice); United States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980) ("It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel".); Mastrian v. McManus, 554 F.2d 813, 820-21 (8th Cir. 1977) ("It is clear 'that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.'") (quoting Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951)); United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975) ("When conduct of a Government agent touches upon the relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of fatal intrusion and must accordingly be carefully scrutinized."); Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953) ("[I]nterception of supposedly private telephone consultations between accused and counsel, before and during trial, denies the

[10] Although Fisher explained the rationale behind the privilege in terms of a later disclosure by the attorney, it is clear that the rationale behind Fisher applies equally to contemporaneous disclosures—such as covert surveillance of attorney-client communications by the government.

accused his constitutional right to effective assistance of counsel, under the Fifth and Sixth Amendments."); 24 C.A. Wright & K.W. Graham, Jr., Federal Practice and Procedure § 5489 (1986) ("[C]onfidential communications between a criminal defendant and his attorney are thought to be a right guaranteed by the Sixth Amendment....").

By permitting the government to intrude on confidential attorney-client communications, the NSA Surveillance Program raises serious Sixth Amendment concerns. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977) (government intrusion into attorney-client relationship violates the Sixth Amendment if the defendant is prejudiced by the intrusion); United States v. Schwimmer, 924 F.2d 443, 447 (2d Cir. 1991) (same); United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985) (same); United States v. Dien, 609 F.2d 1038, 1043 (2d Cir. 1979) (same); Klein v. Smith, 559 F.2d 189, 197-98 (2d Cir. 1977) (same); United States v. Massino, 311 F. Supp. 2d 309, 313 (E.D.N.Y. 2004) (same). The analysis under Weatherford and its progeny has been refined in the Second Circuit, such that "[t]o establish a Sixth Amendment violation, the defendants . . . would have to show either that privileged information was passed to the government and prejudice resulted, or that the government intentionally invaded the attorney client relationship and prejudice resulted". Massino, 311 F. Supp. 2d at 313. Here, of course, because of the high level of secrecy surrounding the NSA Surveillance Program, it would be virtually impossible for any criminal defendant to make this showing with regard to attorney-client communications intercepted under the Program. However, that only underscores the pernicious effect of the NSA Surveillance Program, which raises the same concerns that underlie the Weatherford line of cases and yet evades any judicial review. The NSA Surveillance Program certainly intrudes on confidential communications between attorneys and their clients, and there is a strong likelihood that criminal defendants have been prejudiced—and will continue to be prejudiced—by the ever-present threat of government eavesdropping.

Although the details of the NSA Surveillance Program are murky, it is clear that the Program is fundamentally at odds with the Sixth Amendment's deep respect for attorney-client confidentiality. The Department of Justice has admitted that the Program reaches attorney-client communications, as long as the persons under surveillance otherwise meet the standards for surveillance under the Program. DOJ Responses ¶ 45. By invading the sanctity of the attorney-client relationship,[11] the Program chills all communications between those who "perceive themselves, whether reasonably or unreasonably, as potential targets"[12] of surveillance and their attorneys. A criminal defendant who worries that his communications with counsel could be subject to surveillance will understandably be "reluctant to confide in his lawyer", Fisher, 425 U.S. at 403, and will thus be unable to obtain fully informed advice. The NSA Program would render the Sixth Amendment's guarantees meaningless for such a defendant. It is simply impossible to reconcile the Constitutional right to effective assistance of counsel with a surveillance program that permits the government to secretly eavesdrop on confidential attorney-client communications.

D. The NSA's Surveillance Practices Place Lawyers in an Untenable Ethical Dilemma.

The chilling effect caused by government monitoring of attorney-client communications can be so severe as to cause an attorney to violate ethical duties merely by

[11] "The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts." Coplon, 191 F.2d at 758. In stark contrast to the NSA surveillance program, FISA shows considerable respect for the attorney-client relationship. See supra, for a discussion of FISA's minimization procedures.

[12] Legislative History at 8.

accepting representation of a client. The American Bar Association ("ABA") and the National Association of Criminal Defense Lawyers ("NACDL") have both considered the ethical dilemma posed by Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", 66 F.R. 57833 (Nov. 16, 2001), available at 2001 WL 34773797, which permitted civilian attorneys to represent accused persons held in military custody at Guantanamo Bay, but required that all communications between an accused and his civilian attorney be monitored by a military representative. The ABA stated that government monitoring of attorney-client communications, "which forces [civilian attorneys] to agree to an 'invasion of the defense camp' by the government as a condition of service, clearly violates the attorney-client privilege, chills the attorney-client relationship of trust and confidence, and forces [civilian attorneys] to contravene the requirements of the Model Rules of Professional Conduct." Report of the ABA Task Force on Treatment of Enemy Combatants (August 2003) at 9, available at http://www.nimj.com/documents/ABA_CDC_Corrected_Fin_Rep_Rec_FULL_0803.pdf. (emphasis added). Similarly, the NACDL concluded that an attorney's ethical obligation to "zealously represent" clients was compromised by, among other things, the monitoring of attorney-client communications, and that an attorney could not, consistent with ethical duties, accept representation of a client under these circumstances. NACDL Ethics Advisory Committee Opinion 03-04 (August 2003), available at http://www.nacdl.org/public.nsf/freeform/ethicsopinions?opendocument. The NACDL joined in the ABA's Recommendation that "[t]he government should not monitor privileged communications, or interfere with confidential communications, between defense counsel and client". Id.

Although the NSA surveillance program may not raise as stark an ethical dilemma as the monitoring of all attorney-client communications at Guantanamo Bay, its pernicious effect may be even worse because of the potentially vast (and unknown) scope of attorney-client communications being monitored.

Conclusion

For the foregoing reasons, the Association respectfully requests that the Court grant plaintiffs' motion for partial summary judgment.

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